See Leong Chye @ Sze Leong Chye v See Ewe Lin

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–944 OF 2011
ZAHARAH IBRAHIM, MOHTARUDDIN BAKI AND MAH WENG KWAI JJCA
22 AUGUST 2013

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Contract — Act done to benefit another — Contracts Act 1950 s 71 — Land co-owned by two persons in equal shares — One co-owner spent monies to convert category of land use from agriculture to industry — Whether claim against other co-owner for reimbursement of half the expenses incurred for the conversion was time barred — Whether claim for reimbursement for half of total quit rent and assessment paid claimable — Contracts Act 1950 s 70 — Limitation Act 1953

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The appellant and the respondent were brothers and co-proprietors in equal shares of a piece of land. The appellant, on his own, incurred costs ('the conversion fees') to convert the category of the land's use from agriculture to industry and he had also been paying the quit rent and assessment payments ('the outgoings') for the land. On 11 June 2004, the appellant sued the respondent in the High Court for a declaration that the latter as half owner of the land was liable to pay him half of the total outgoings as well as half of the total conversion fees. In his defence and counterclaim, the respondent claimed the appellant held his half-share in the land on trust for the respondent and sought a declaration to that effect. The respondent claimed he became physically disabled after an accident and the compensation he received for his disability was used to pay for half the purchase price of the land bought by the respondent's father for the respondent's use. The respondent claimed the sole reason the appellant was registered as co-owner was to enable him to manage the property as he lived comparatively closer to the land. The respondent denied the appellant's claim and alternatively pleaded that it was in any event time barred. The High Court held, inter alia, that the appellant held his share in the land on trust for the respondent. The main issue in the instant appeal was against that finding. A secondary issue was whether the claim for outgoings incurred before 1998 was statute barred.

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Held:

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(1) Pursuant to s 70 of the Contracts Act 1950 ('the Act'), the appellant was entitled to be reimbursed by the respondent for the quit rent and assessment he had paid as the respondent was bound under the law as co-owner to pay those sums to the relevant authorities in relation to the land. The appellant's cause of action for reimbursement for half of the

outgoings arose each time such payments were made. However, payments for outgoings that were made before the period of six years prior to the filing of the suit in the High Court were barred by limitation (see paras 52 & 62–63).

(2) The appellant's claim for reimbursement from the respondent of half of the survey charges and conversion fees pursuant to s 71 of the Act was a cause of action that arose in 1993 when those expenses were incurred. Therefore the claim for those charges was barred by limitation (see paras 50–51).

(3) The trial court made several findings of material facts which were inconsistent with the evidence, in particular, the contemporaneous documents that were tendered. The evidence showed that as the respondent only received his compensation monies for his accident about two years after the appellant had purchased his half-share, the compensation monies could not possibly have been used to pay for the purchase of the appellant's share in the land. The endorsement on the land title showed the land was registered in the name of the plaintiff and one Tan Ah Ee ('Tan') in March 1974 in equal undivided shares and that it was only in 1976, that Tan's share was transferred to the defendant and the respondent's compensation monies were used to pay Tan. The evidence showed the mother of the parties was the real beneficial owner of the land as she had advanced the monies to buy one half-share in the land in 1974 and the other half-share in 1976 and it was her instructions that the land be held on trust by both the appellant and the respondent for the benefit of their other siblings (see paras 19, 24–26 & 41).

[Bahasa Malaysia summary

Perayu dan responden adalah adik-beradik dan pemilik bersama dalam saham yang sama rata terhadap sebidang tanah. Perayu, bagi pihaknya sendiri, menanggung kos ('fi pertukaran') untuk menukar kategori tanah digunakan daripada agrikultur kepada industri dan dia juga telah membayar cukai tanah dan taksiran ('wang keluar') untuk tanah tersebut. Pada 11 Jun 2004, perayu menyaman responden di Mahkamah Tinggi untuk satu deklarasi bahawa yang kedua sebagai setengah pemilik tanah adalah bertanggungan untuk membayar kepadanya setengah jumlah wang keluar dan juga setengah jumlah fi pertukaran. Dalam pembelaan dan tuntutan balasnya, responden mendakwa bahawa perayu memegang setengah sahamnya dalam tanah secara amanah bagi pihak responden dan menuntut deklarasi bagi tujuan tersebut. Reponden mendakwa bahawa dia menjdi kurang upaya selepas kemalangan dan pampasan yang diterimanya untuk kekurang upayaannya telah digunakan untuk setengah harga beli tanah tersebut oleh bapa responden untuk kegunaan responden. Responden mendakwa bahawa satu-satunya alasan perayu didaftarkan sebagai pemilik bersama adalah untuk membolehkan dia menguruskan hartanah memandangkan dia tinggal berhampiran dengan

tanah tersebut. Responden menafikan tuntutan perayu dan secara alternatif memplidkan bahawa dalam apa-apa keadaan terhalang oleh had masa. Mahkamah Tinggi memutuskan, antara lain, bahawa perayu memegang sahamnya dalam tanah secara amanah untuk responden. Isu utama dalam rayuan ini adalah terhadap dapatan. Isu kedua adalah sama ada tuntutan untuk wang keluar sebelum tahun 1998 dihalang oleh statut.

Diputuskan:

(1) Menurut s 70 Akta Kontrak 1950 ('Akta'), perayu berhak dibayar semula oleh responden untuk cukai tanah dan taksiran yang telah dibayarnya kerana responden terikat di bawah undang-undang sebagai pemilik bersama untuk membayar jumlah-jumlah tersebut kepada pihak berkuasa yang relevan berkaitan tanah tersebut. Kausa tindakan perayu untuk bayaran semula bagi setengah wang keluar timbul setiap kali bayaran-bayaran sebegitu dibuat. Walau bagaimanapun, bayaran untuk wang keluar yang dibuat sebelum tempoh enam tahun sebelum pemfailan guaman di Mahkamah Tinggi terhalang oleh had masa (lihat perenggan 52 & 62–63).

(2) Tuntutan perayu untuk bayaran semula daripada responden untuk setengah caj-caj tinjauan dan fi pertukaran menurut s 71 Akta adalah kausa tindakan yang timbul pada tahun 1993 apabila perbelanjaan-perbelanjaan ditanggung. Oleh itu tuntutan untuk caj-caj tersebut terhalang oleh had masa (lihat perenggan 50–51).

(3) Mahkamah perbicaraan membuat beberapa dapatan fakta material yang mana tidak konsisten dengan keterangan, terutamanya, dokumen-dokumen semasa yang dikemukakan. Keterangan menunjukkan bahawa memandangkan responden hanya menerima wang pampasannya bagi kemalangan yang dialaminya lebih kurang dua tahun selepas perayu membeli setengah sahamnya, wang pampasan tersebut tidak mungkin digunakan untuk membayar pembelian saham perayu dalam tanah tersebut. Pengendorsan hakmilik tanah menunjukkan tanah didaftarkan atas nama plaintif dan seorang Tan Ah Ee ('Tan') pada Mac 1974 pada saham sama rata tidak dibahagikan dan itu hanyalah pada tahun 1976, bahawa saham Tan dipindahkan kepada defendan dan wang pampasan responden digunakan untuk membayar Tan. Keterangan menunjukkan ibu kepada pihak-pihak adalah pemilik benefisial sebenar terhadap tanah kerana dia telah mendahulukan wang untuk membeli satu setengah saham dalam tanah pada tahun 1974 dan lagi setengah saham pada tahun 1976 dan ia adalah arahannya bahawa tanah tersebut dipegang secara amanah oleh kedua-dua perayu dan responden untuk faedah adik-beradik mereka yang lain (lihat perenggan 19, 24–26 & 41).]

Notes

For a case on Contracts Act 1950 s 71, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2907.

Cases referred to

PR SP Periakaruppan Chettiar v Yong Book Fong [1972] 1 MLJ 160, FC (refd)
Yong Book Fong v Nallakaruppan Chettiar & Ors [1972] 1 MLJ 13 (refd)

Legislation referred to

Contracts Act 1950 ss 70, 71
Local Government Act 1976
National Land Code

Appeal from: Civil Suit No 22–467 of 2004 (High Court, Shah Alam)

Saseedaran Menon (B Muralidharan and V Premshankar with him) (Lewis & Co) for the appellant.
Saw Lip Khai (Chooi, Saw & Lim) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The appellant and the respondent are brothers. They are the registered co-proprietors (holding equal shares) of a piece of land held under EMR 2884, being Lot 549, in the Mukim and District of Petaling, Selangor ('the land').

[2] For ease of reference, we shall refer to the parties as they were in the High Court.

[3] The land, which was originally subject to the category of land use of agriculture, was converted in 1993 to the category of industry on the application of the plaintiff, which he claimed was made with the knowledge and consent of the defendant. The plaintiff incurred charges and expenses as a result of the application for conversion, including the payment of surveyor's charges, clearing and filling of land and conversion fees.

[4] Before and after the conversion, the plaintiff had paid all the outgoings in respect of the land, being the payments under the National Land Code of the annual land rents ('the quit rents') and under the Local Government Act 1976 of the annual rates ('the assessment rates').

[5] The plaintiff had demanded from the defendant, as the co-proprietor of the land, the sum of RM162,912.50, being half of the total sums paid by the

plaintiff in respect of the conversion costs and fees and the outgoings incurred in respect of the land. The defendant refused to pay.

[6] The plaintiff then filed this suit on 11 June 2004 seeking a declaration that the defendant, as half owner of the land, is liable to pay half of the outgoings and expenses incurred in respect of the land.

[7] The plaintiff also claims for the sum of RM162,912.50, being half the amount he had already incurred in respect of the land, and interest thereon.

[8] With regard to the declaration sought by the plaintiff, the defendant in his defence and counterclaim claims that the plaintiff in fact holds the plaintiff's share in the land as a trustee for the defendant. He claims that the land was purchased in 1976 by their father at the price of RM60,000. Of that sum, RM30,000, according to the defendant, came from the damages/compensation received in 1975 from the insurance company as a result of an accident in which the defendant was involved in 1971. The defendant claims to have become paralysed from the waist down and was bedridden for three years.

[9] The defendant claims that the land was bought by their father as investment for the defendant's future needs due to his physical disability as a result of the accident. A half-share in the land was registered in the plaintiff's name, according to the defendant, due to the fact that he (the defendant) lived in Pulau Pinang whilst the plaintiff lived in Petaling Jaya, close to the location of the land and therefore was in a better position to manage the land.

[10] As for the declaration and the outgoings claimed by the plaintiff, the defendant denies that the plaintiff had incurred the sums and in the alternative pleaded that the plaintiff's claim is barred by limitation.

[11] In his counterclaim, the defendant seeks a declaration that the share held by the plaintiff is held by the plaintiff on trust for the defendant and additionally seeks an order that the plaintiff be made to execute the necessary documents for the transfer of the share held by the plaintiff to the defendant within 14 days of the order, failing which the senior assistant registrar of the High Court must execute such documents.

[12] By the time the case came to trial, the land had been transferred to a third party. This gave rise to another suit in which both the plaintiff and the defendant got together and sued for a declaration that they are the lawful owners of the land and the land had been fraudulently transferred to the first of the defendants in that suit. However, that suit has no direct bearing on this appeal.

A THE HIGH COURT DECISION

[13] At the High Court, as reflected in the grounds of judgment of the learned High Court judge and the notes of proceedings, counsel for the defendant admitted that the plaintiff had been paying for all the outgoings but, rather bizarrely, contended that the defendant would not pay half of the outgoings as the plaintiff had not transferred the plaintiff's share to the defendant.

[14] After a lengthy submission and exchange between counsel for both sides and between counsel and the learned High Court judge, the learned High Court judge took the position that the defendant had consented to pay half of the outgoings from 1998 until the date of the trial. The learned High Court judge then recorded as follows:

> ... from 1998 till now, the defendant is to pay 1/2 of the expenses, by consent.

[15] The learned High Court judge, at the conclusion of the trial, concluded and declared, as prayed for in the counterclaim, that the share held by the plaintiff was held in trust for the defendant.

[16] It is that declaration which is the principal subject matter of the appeal before us.

F ISSUES DURING THE APPEAL

[17] The main issue during the appeal is whether the learned High Court judge had erred in coming to the decision that the plaintiff's share in the land was held in trust by the plaintiff for the defendant.

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[18] The secondary issue is the issue of whether the claim for outgoings incurred before 1998 is statute barred.

ANALYSIS OF ISSUES

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Whether the plaintiff's share is held in trust for the defendant

[19] After scrutinising the record of appeal, we find that the learned High Court judge had made several findings of material facts which are inconsistent with the evidence led before the trial court, in particular the contemporaneous documents tendered before the court.

Time of purchase of the plaintiff's share vs payment of compensation

[20] The defendant's claim that the plaintiff's share in the land is held in trust for him is based on his contention that the share was purchased for him by his parents partly using the money received as compensation from the insurance company as result of his accident.

[21] The learned High Court judge found that 'it is clear in evidence that the Plaintiff's half-share was bought in 1973 and the accident which involved the Defendant was in 1971. Again here I found that the Defendant's story that the Plaintiff's half share was purchased for his benefit is corroborated by the evidence of the time of purchase'.

[22] The defendant's pleaded case as seen in para (ii) of the particulars of trust in his defence and para 1 of his counterclaim is that he received the compensation in 1975. In his evidence before the court, the defendant confirmed that he received the money in 1976.

[23] Indeed, the acknowledgement by the defendant himself of the receipt of the sum of RM31,578.71, in full settlement of his claims in the accident case, bears a date in February 1976.

[24] However, the endorsement on the issue document of title shows that the land was transferred to and registered in the name of the plaintiff and one Tan Ah Ee on 16 March 1974, in equal undivided shares.

[25] It was only on 3 July 1976 that Tan Ah Ee's share was transferred and registered in the name of the defendant. The defendant's own evidence was that the payment of compensation was in February 1976. The monies were used to pay Tan Ah Hee.

[26] As the compensation money was only received about two years after the plaintiff's purchase of his share, the compensation money could not possibly have been used to pay for the purchase of the plaintiff's share in the land.

PW2's evidence on compensation money

[27] The evidence of another brother, 'PW2', was that his mother told him the compensation money was used to buy shares in Selesa Harta Sdn Bhd ('Selesa Harta') in the name of the defendant. He was instructed to attend to the purchase of the shares and did so as he was the company secretary and director of Selesa Harta at the material time.

[28] The directors' resolution passed on 24 December 1976 by the board of directors of Selesa Harta shows that the board had approved the allotment of 100,000 shares in the company to the defendant. Over the years the defendant had acquired more shares, either by rights issue or otherwise, in the company.

[29] It was suggested by counsel for the defendant to PW2 that the money used to purchase the Selesa Harta shares was borrowed from See Eng Lock Sdn Bhd (in fact See Eng Lock Holdings Sdn Bhd). PW2 said See Eng Lock Sdn Bhd was only incorporated in 1983. The Companies Commission records show that See Eng Lock Holdings Sdn Bhd was in fact first registered on 18 August 1980. The Selesa Harta shares could not possibly have been purchased using money borrowed from See Eng Lock Holdings Sdn Bhd.

[30] This corroborates PW2's evidence that the compensation money was used to pay for the shares in the defendant's name in Selesa Harta.

[31] The fact, as mentioned above, that the compensation money was actually paid to, and acknowledged to have been received by, the defendant himself (who would have been 21 years old by then and no longer a minor), and not the mother or father further lends support to the plaintiff's evidence that it was the mother who had bought the share in the land, which share was then registered in the defendant's name.

Credibility of the defendant's evidence vs the plaintiff's evidence

[32] In her grounds of judgement the learned High Court judge found that the defendant's story was straightforward and that it was the plaintiff's story that Her Ladyship found 'rather unconvincing'.

[33] After having closely studied the notes of evidence, we are unable to find the basis for such finding.

[34] The notes of evidence disclose that the defendant ('as DW2') in the course of his evidence attempted to give the impression that the plaintiff and PW2 are rogues. The learned High Court judge had to intervene several times to caution him. This was not the case with the plaintiff. His evidence was straightforward, although not quite directly to the point at all times.

[35] Her Ladyship's reasons for finding the plaintiff's story 'rather unconvincing' appear in para 10 of the grounds of judgement. We believe it is useful to reproduce the relevant portion of that paragraph:

> ... At the start of the trial, it appeared that his contention was that the half share in the said land which was registered in his name actually belonged to him. He also

> produced a stamped document from the solicitors showing the said solicitors having receipt of five cheques from himself and Tan Ah Ee being part payment towards the purchase of the said land. By the end of his evidence, however, the plaintiff said his mother's instruction was that he and the defendant were to hold the said land in trust for the benefit of their other siblings. ... In short, the plaintiff is now admitting that, he is holding the half-share which is in his name in trust and that the half-share does not in reality belong to him.

[36] What must not be lost sight of is that the plaintiff is NOT seeking a declaration that the share he holds is NOT held by him in trust. Neither is he claiming the defendant's share as being held in trust for himself (the plaintiff). His claim was merely for the reimbursement by the defendant, the equal co-proprietor, of outgoings in respect of the land already paid by him.

[37] One would have thought that if the plaintiff is such a rogue as the defendant attempted to paint him to be, the plaintiff would have not said anything about his late mother's instruction that even his share is to be held in trust for the other siblings. After all, there is no document to that effect and that share is registered in his name.

[38] In fact, it would have been easy for the plaintiff to claim that the share in the defendant's name is held in trust for himself (the plaintiff). The letter from Messrs Michael Chen & Lee on the purchase of the share from Tan Ah Ee shows that the solicitors acted on the plaintiff's instructions when they sent the sale and purchase agreement to the defendant to be executed. Clearly it was the plaintiff who made the necessary arrangements on behalf of their mother for the purchase of the Tan Ah Ee's share and that share was subsequently registered in the defendant's name.

[39] We find that the learned High Court judge did not fully appreciate the plaintiff's evidence.

[40] The plaintiff had explained that he borrowed money from his mother to buy the half share in the land. He admitted that at the time when his mother bought the other half share to be registered in the defendant's name, he (the plaintiff) had not paid the loan to his mother. His mother then gave instructions that they (the plaintiff and the defendant) both would hold the land for the benefit of their other siblings. Impliedly, at this point in time the loan would no longer need to be repaid as the plaintiff would no longer have beneficial interest in the half share in the land in his name.

[41] Their mother's instructions that the land be held in trust by the plaintiff and the defendant for the other siblings would make sense as she was the real

beneficial owner of the land having advanced the purchase price for the purchase of half share of the land in 1974 and the other half in 1976.

[42] Seen in the light of this explanation, there is nothing inconsistent in the plaintiff's evidence. The learned High Court judge's 'doubts as to the veracity' of the plaintiff's story are clearly unsupported by evidence.

Whether the claim for payments before 1998 is statute barred

[43] The learned High Court judge had recorded that by consent the defendant was to pay half of all the outgoings expended by the plaintiff from 1998–2009.

[44] The suit in the High Court was filed by the plaintiff on 11 June 2004. Under ordinary circumstances, any claim for amounts incurred before 11 June 1998 would be barred by limitation. The plaintiff however contends that he first made the demand for reimbursement, which the defendant refused to pay, in 2003. Hence, he says, the period of limitation should only begin from that period. We are unable to agree.

[45] The paintiff's claim for reimbursement falls into two categories.

[46] Under the first category are payments made for and incidental to the conversion of the land from the category of agriculture to the category of industry. These were 'one off' payments made in 1993.

[47] Under the second category are the quit rents and assessment rates paid by the plaintiff under the relevant laws in respect of the land from 1974–2003.

Conversion costs and fees

[48] Under s 71 of the Contracts Act 1950, 'Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered'.

[49] The conversion of category of land use of the land from agriculture to industry was made voluntarily by the plaintiff. He says it was made with the knowledge and consent of the defendant. The conversion resulted in an increase in the value of the land and its marketability. This increase is of benefit not only to the plaintiff but also to the defendant as co-proprietor.

[50] In our view, the plaintiff's claim from the defendant for half of the conversion fees and survey charges falls under s 71 of the Contracts Act.

[51] The cause of action for this had clearly arisen at the time the expenses were incurred during the conversion in 1993. Therefore, we are of the view that the plaintiff's claim for half of the survey charges and conversion fees is barred by limitation.

Quit rents and assessment rates (outgoings)

[52] Under s 70 of the Contracts Act 1950, 'A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other'. The plaintiff is therefore entitled to be reimbursed by the defendant for any sum he paid being sums the defendant is bound under the law to pay to the relevant authorities in relation to the land the defendant co-owns. These are the quit rents and the assessment rates.

[53] We note that the plaintiff had also included in his claim the quit rents and assessment rates for the years 1974–1975. It must be remembered the defendant only became co-proprietor of the land in 1976. He cannot possibly be made to reimburse half of the quit rent and assessment for the period before he became a co-proprietor of the land.

[54] As for the balance of the claim for the outgoings, the question to be answered is when do the cause of action arises and the period of limitation begins to run under s 70 of the Contracts Act 1950?

[55] In *Yong Book Fong v Nallakaruppan Chettiar & Ors* [1972] 1 MLJ 13, Mohamed Azmi J (as His Lordship then was) had to deal, inter alia, with the same question.

[56] In that case, the plaintiff gave an interest-free loan of $7,000 to the three defendants and another person ('the Kajang Chettiars') to enable them to settle a judgment obtained against them. He raised the sum of $7,000 by borrowing money from a group of Chettiars in Muar ('the Muar Chettiars') and putting up two pieces of land as security. The Kajang Chettiars undertook to pay, in the plaintiff's name, the interest payable every month to the Muar Chettiars. The Kajang Chettiars failed to pay the interest, thus forcing the plaintiff to settle the loan to prevent the land from being foreclosed.

[57] His Lordship found that the plaintif's claim for reimbursement from the defendants came within the ambit of s 70 of the Contracts Act 1950 as the Kajang Chettiars were bound under their agreement with the plaintiff (and

therefore bound by law) to pay the interest to the Muar Chettiars, and it was in the plaintiff's interest that he paid the Muar Chettiars in order to save the land from being foreclosed.

[58] His Lordship then considered the question of whether the action was statute barred. His Lordship was of the view that '... the right to bring an action under s 70 in the present case only arises when the plaintiff paid the loan to the Muar Chettiars which the defendants are bound to pay under the agreement'.

[59] The decision of Mohamed Azmi J was overturned by the Federal Court in *PR SP Periakaruppan Chettiar v Yong Book Fong* [1972] 1 MLJ 160 in a majority decision. The Federal Court held that the plaintiff's claim did not fall within the ambit of s 70 of the Contracts Act 1950 as the appellant/third defendant's obligation was to pay the plaintiff under the agreement between the plaintiff and the Kajang Chettiars, not the Muar Chettiars from whom the plaintiff borrowed the money.

[60] However, it is pertinent to note that the question of when the cause of action arose in that case (and consequently when the period of limitation began to run) was not an issue before the Federal Court. We are of the view that His Lordship Mohamed Azmi J's views on that question remain unchallenged and undisturbed.

[61] We agree with His Lordship Mohamed Azmi J's views that the cause of action for the purpose of s 70 of the Contracts Act 1970 arises when payment is made by the interested person.

[62] Thus, in the case before us we are of the view that the cause of action for the reimbursement by the defendant of half of the payments made by the plaintiff to the state authority and the local authority for the quit rents and the assessment rates, respectively, arose every time such payments were made.

[63] Consequently, the plaintiff's claim for reimbursement for half of the payments made before the period of six years prior to the filing of this suit are barred by limitation.

DECISION

[64] Based on our findings as set-out above, we allow this appeal and we set aside the order of the High Court declaring that the plaintiff holds the half share registered in his name as being so held in trust for the defendant. Consequently we also set aside the order granting liberty to the defendant to apply for future ancillary orders arising from his counterclaim.

[65] We also order that half of the total amounts of the outgoings (being the quit rents and the assessment rates) paid by the plaintiff and which are not barred by limitation be paid by the defendant to the plaintiff without interest.

[66] We further order that costs of RM20,000 be paid by the respondent/defendant to the appellant/plaintiff. The order by the High Court that parties are to bear their own costs in the High Court is maintained.

Order accordingly.

Reported by Ashok Kumar